

# Comparative Common Law – United States of America

“[a]fter all, that is the beauty of the common law; it is a maze and not a motorway.” Lord Diplock

## Class Summary

This class considers the common law influence upon the development of native title to land. Concepts such as permissive Indian occupancy will be introduced and discussed in light of the relevant case law. The right to land of Native Americans is in a particularly precarious position in that ownership is not recognised by Congress and can be extinguished by Government without compensation. Currently no court has held that the taking of Indian title or use by Congress required compensation.

## Reading Task

Please read the following cases which are accessible at the links copied below and then please answer the discussion questions:

1. **JOHNSON and GRAHAM’S Lessee v. WILLIAM M’INTOSH**
2. **Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)**

## Self Check Questions

1. Chief Justice Marshall in the case of Johnson and Graham’s Lessee v William M’Intosh had to consider the question whether Indian title can be recognised in the Courts of the United States.
2. In the case of **Tee-Hit-Ton Indians v. United States** the court had to consider 5th Amendment of the US Constitution. Please identify what aspect of the 5th Amendment the court had to apply and why did they reach the decision that they did?

## Further Recommended Reading:

1. **Tohono O’odham Nation: U.S. Blasts a Monument to Build a Wall**
2. **Subcommittee Hearing**
3. **Richard E. LYNCH, Secretary of Agriculture, et al., Petitioners v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION et al.**

This teaching material has been made at the University of Szeged, and supported by the European Union by the project nr. EFOP-3.6.2-16-2017-00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.



Author – Dr. Samantha Joy Cheesman



### *Further Self-Check Questions*

1. What is the justification given by the Trump administration for bypassing several federal environmental and cultural protection laws in order to build their wall across Native American Land?
2. What is the purpose of the Native American Graves Protection and Repatriation Act (NAGPRA)?
3. How has the failure to engage in formal consultation with tribal governments before decisions are made violated the IIRIRA, and the Executive Order No. 13175, “Consultation and Coordination with Indian Tribal Governments” ?
4. Define the “Free Exercise Clause”.

### *Definitions/Key Terminology*

Please take the time to familiarise yourself with this terminology as they are key to understanding this area of the law

- Doctrine of continuity
- Doctrine of recognition
- Indigenous land rights
- Internal sovereignty
- Right of Occupancy
- Meaningful consultation
- Executive Order
- Injunction
- Extinguishment

